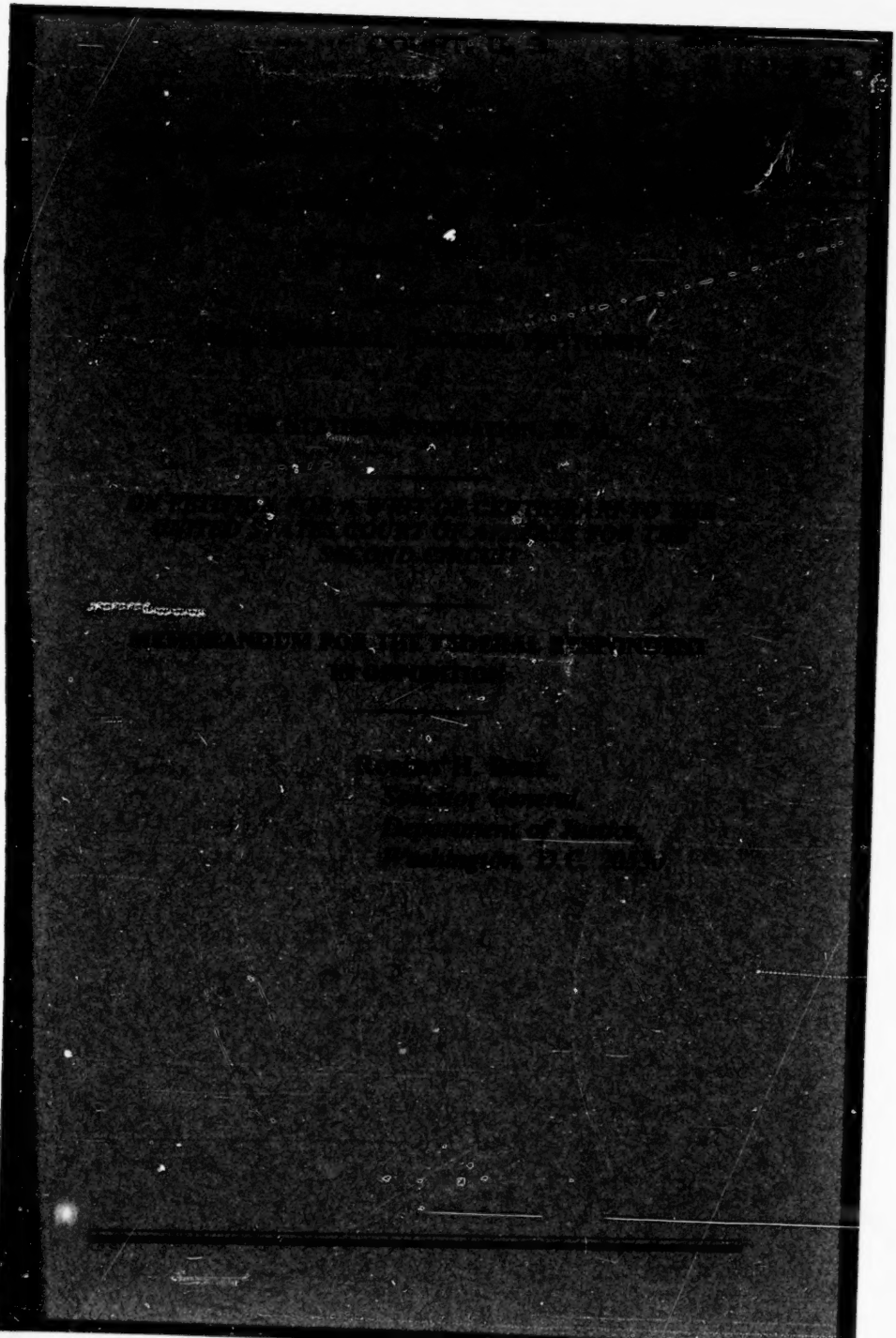

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-677

REV. DONALD L. JACKSON, PETITIONER

v.

THE STATLER FOUNDATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

The sole issue raised by the petition is whether the court of appeals correctly held that an order of the district court staying all further proceedings was not final or appealable.

Petitioner brought this action in the United States District Court for the District of Columbia against 13 charitable organizations, several officials of New York State, and the Secretary of the Treasury. He alleged, *inter alia,* that the charitable organizations refused to employ him, to grant scholarships to his children and to invest in his proposed minority business ventures solely because he was black. Petitioner also alleged that this racially discriminatory conduct constituted impermissible state action because the Secretary of the Treasury and the

named New York officials had granted tax-exempt status to these charitable organizations. He sought a three-judge court, damages and declaratory and injunctive relief requiring the termination of the tax-exempt status of the charitable organizations.

Because petitioner had a nearly identical suit in progress in the United States District Court for the Western District of New York, the district court, *sua sponte*, transferred this case to that district. With the exception of the Commissioner of Internal Revenue and the District Director of Buffalo, New York, the parties in the latter suit were identical to those in this case and petitioner's grounds for relief were essentially the same in both actions.[1]

Shortly after the transfer of this case, the District Court for the Western District of New York stayed all proceedings in this action until further order. The court stated that it found the two actions nearly identical, and that it would be unjust and impractical to proceed with both suits at the same time. It also denied petitioner's motion for summary judgment (Pet. App. 3-c to 5-e).

Petitioner thereafter moved the district court to terminate the stay to vacate the denial of his motion for summary judgment and to convene a three-judge court (Pet. App. 6-f to 7-g). The district court denied petitioner's motion (Pet. App. 12-k), and the court of appeals dismissed petitioner's appeal on the ground that the district court's order was not final or appealable (Appendix, *infra*, pp. 5-14).

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[1]Petitioner's action in the Western District of New York had been dismissed on the pleadings in March 1973, after pre-trial discovery by the defendant-charitable organizations. The court of appeals (496 F. 2d 623) affirmed in part, reversed in part and remanded the case to the district court. On remand, the district court granted petitioner leave to amend his complaint and to add additional parties, as the court of appeals suggested (Pet. App. 15-n).

1. The district court's order refusing to terminate the stay of proceedings in this action is not an appealable "final" order within the meaning of 28 U.S.C. 1291. The order was interlocutory and not dispositive of any "claims of right separable from * * * rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546. See also *Baltimore Contractors* v. *Bodinger*, 348 U.S. 176; *Standard Chlorine of Delaware, Inc.* v. *Leonard*, 384 F. 2d 304 (C.A. 2); *New England Power Co.* v. *Asiatic Petroleum Corp.*, 456 F. 2d 183 (C.A. 1); *Weight Watchers of Phila.* v. *Weight Watchers Int., Inc.*, 455 F. 2d 770 (C.A. 2). Indeed, even giving the finality requirement a "practical rather than a technical construction," *Cohen* v. *Beneficial Loan Corp., supra*, 337 U.S. at 546, the district court's order is not final since petitioner's essentially identical action originally brought in the Western District of New York has been allowed to proceed in that court so that the district court's order in this case has not effectively forced petitioner out of court. Cf. *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715, n. 2. To the contrary, the order was within the discretion of the district court as a means of controlling petitioner's litigation. *Baltimore Contractors* v. *Bodinger, supra*, 348 U.S. at 185; *Enelow* v. *N.Y. Life Ins. Co.*, 293 U.S. 379, 382.

2. Petitioner also asks this Court to review the district judge's failure to recuse himself. Petitioner, however, did not submit the required affidavit under 28 U.S.C. 144, and the district court's order does not relate to the recusal issue. At all events, a judge's failure to recuse himself is not directly appealable. *E.g., Vuono* v. *United States,* 441 F. 2d 271 (C.A. 4).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

APPENDIX

UNITED STATES COURT OF APPEALS

Second Circuit

* * *

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentysecond day of October , one thousand nine hundred and seventy-four.

Rev. Donald L. Jackson, PLAINTIFF-APPELLANT.

v.

The Statler Foundation, Camerion Baird Foundation, The Baird Foundation, William J. Conners Foundation, James H. Cummings Foundation, Harry Dent Family Foundation, Ferguson Foundation, Inc., Josephine Goodyear Foundation, Julia R. and Estelle L. Foundation, Inc. The Margaret L. Wendt Foundation, The Farny R. and Grace K. Wurlitzer, Inc., Fred L. Emerson Foundaation, Inc. Judge William J. Regan, Hon. Mario A. Procaccino, Hon. Louis J. Lefkowitz, Attorney General State of New York and Hon. George P. Shultz, Defendants-Appellees.

It is hereby ordered that upon consideration of the motion made herein by counsel for the

APPELLEE Camerion Baird Foundation

by notice of motion dated September 18, 1974 to dismiss the appeal from the United States District Court for the Western District of New York and for lack of jurisdiction with costs that the motion to dismiss be and it hereby is granted.

A. Daniel Fusaro
Clerk

By
Senior Deputy Clerk

BEFORE: HON. LEONARD P. MOORE
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS
Circuit Judges

UNITED STATES COURT OF APPEALS

Second Circuit

* * *

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentysecond day of October , one thousand nine hundred and seventy-four.

Rev. Donald L. Jackson, PLAINTIFF-APPELLANT.

v.

The Statler Foundation, Camerion Baird Foundation, The Baird Foundation, William J. Conners Foundation James H. Cummings Foundation, Harry Dent Family Foundation, Ferguson Foundation, Inc., Josephine Goodyear Foundation, Julia R. and Estelle L. Foundation, Inc., The Margaret L. Wendt Foundation, The Farny R. and Grace K. Wurlitzer, Inc., Fred L. Emerson Foundaation, Inc., Judge William J. Regan, Hon. Mario Procaccino, Hon. Louis J. Lefkowitz, Attorney General State of New York and Hon. George P. Shultz,
Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the

APPELLEE Julia R. and Estelle L. Foundation, Incorporated

dated September 18, 1974 to dismiss the appeal from the United States District Court for the Western District of New York for lack of jurisdiction be and it hereby is granted.

A. Daniel Fusaro
Clerk

By
Senior Deputy Clerk

BEFORE: HON. LEONARD P. MOORE
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS
Circuit Judges

UNITED STATES COURT OF APPEALS

Second Circuit

* * *

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentysecond day of October , one thousand nine hundred and seventy-four.

Rev. Donald L. Jackson, PLAINTIFF-APPELLANT.

v.

The Statler Foundation, Camerion Baird Foundation, The Baird Foundation, William J. Conners Foundation James H. Cummings Foundation, Harry Dent Family Foundation, Ferguson Foundation, Inc., Josephine Goodyear Foundation, Julia R. and Estelle L. Foundation, Inc., The Margaret L. Wendt Foundation, The Farny R. and Grace K. Wurlitzer, Inc., Fred L. Emerson Foundaation, Inc., Judge William J. Regan, Hon. Mario A. Procaccino, Hon. Louis J. Lefkowitz, Attorney General State of New York and Hon. George P. Shultz, Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the

APPELLEE Judge William J. Regan

by notice of motion dated September 23, 1974 to dismiss the appeal from the United States District Court for the Western District of New York for lack of jurisdiction, be and it hereby is granted.

A. Daniel Fusaro
Clerk

By
Senior Deputy Clerk

BEFORE: HON. LEONARD P. MOORE
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS
Circuit Judges

UNITED STATES COURT OF APPEALS

Second Circuit

* * *

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentysecond day of October , one thousand nine hundred and seventy-four.

Rev. Donald L. Jackson, PLAINTIFF-APPELLANT.

v.

The Statler Foundation, Camerion Baird Foundation, The Baird Foundation, William J. Conners Foundation James H. Cummings Foundation, Harry Dent Family Foundation, Ferguson Foundation, Inc., Josephine Goodyear Foundation, Julia R. and Estelle L. Foundation, Inc., The Margaret L. Wendt Foundation, The Farny R. and Grace K. Wurlitzer, Inc., Fred L. Emmerson Foundaation, Inc., Judge William J. Regan, Hon. Mario A. Procaccino, Hon. Louis J. Lefkowitz, Attorney General State of New York and Hon. George P. Shultz, Defendants-Appellees.

It is hereby ordered that upon consideration of the motion made herein by counsel for the

APPELLEE The Ferguson Foundation, Inc.

by notice of motion dated September 18, 1974 to dismiss the appeal from the United States District Court for the Western District of New York for lack of jurisdiction with costs that the motion to dismiss be and it hereby is granted.

A. Daniel Fusaro
Clerk

By
Senior Deputy Clerk

BEFORE: HON. LEONARD P. MOORE
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS
Circuit Judges

UNITED STATES COURT OF APPEALS

Second Circuit

* * *

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentysecond day of October , one thousand nine hundred and seventy-four.

Rev. Donald L. Jackson, PLAINTIFF-APPELLANT.

v.

The Statler Foundation, Camerion Baird Foundation, The Baird Foundation, William J. Conners Foundation James H. Cummings Foundation, Harry Dent Family Foundation, Ferguson Foundation, Inc., Josephine Goodyear Foundation, Julia R. and Estelle L. Foundation, Inc., The Margaret L. Wendt Foundation, The Farny R. and Grace K. Wurlitzer, Inc., Fred L. Emerson Foundaation, Inc., Judge William J. Regan, Hon. Mario A. Procaccino, Hon. Louis J. Lefkowitz, Attorney General State of New York and Hon. George P. Shultz, Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the

APPELLEE The Ferguson Foundation, Inc., the Cameron for the Western District of New York for lack of jurisdiction be and it hereby is granted.

by notice of motion dated September 24, 1974 to dismiss the appeal from the United States District Court for the Western District of New York for lack of jurisdiction be and it hereby is granted.

A. Daniel Fusaro
Clerk

By
Senior Deputy Clerk

BEFORE: HON. LEONARD P. MOORE
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS
Circuit Judges